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No. 06-08

In the Supreme Court of the United States

UNITED RETIRED PILOTS BENEFIT PROTECTION ASSOCIATION, ET AL.*

Petitioners,

v.

UNITED AIR LINES, INC., ET AL.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Both questions presented, as listed in the petition, played no role in the holdings of either the court of appeals or the district court below. For the petitioners to obtain relief in this Court, the Court would have to rule in petitioners' favor, not only on the two questions listed in the petition, but also on the question actually addressed by the court of appeals, which is as follows:

> 1. Whether an appellate court errs in applying the doctrine of "equitable mootness" to affirm a bankruptcy court ruling, where, as here, the party challenging that ruling fails to take any steps to stay the ruling's effect pending appellate review or to expedite appellate review and, as a result of those failures, third-party reliance on the ruling has accumulated by the time the appeal is finally heard to the point where no feasible, equitable remedy for the bankruptcy court's alleged error can be devised.

Additionally, the Court would have to rule for the petitioners on the following question:

> 2. Whether the law-of-the-case doctrine requires a court of appeals to deny a request by retired employees to participate in negotiations leading up to a bankruptcy court hearing to reject a collective bargaining agreement under 11 U.S.C. 1113, when, at the time of the appeal, the same court of appeals has already decided the same issue with regard to a similarly situated party in the same bankruptcy case.

Finally, the second question presented in the petition is misstated. Revised to fit the actual contours of this case, that question should be framed as follows:

> 3. Whether retirees drawing pensions under a plan that is required to be maintained by a collective bargaining agreement must be given rights to participate in any renegotiation of that agreement between a labor union representing current employees and the employer as a pre-condition to the union and employer obtaining the bankruptcy court's approval to modify that collective bargaining agreement pursuant to 11 U.S.C. 363(b)(1).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

United Air Lines, Inc. and 27 direct and indirect wholly owned subsidiaries (collectively "United" or the "Company") are reorganized debtors in the underlying bankruptcy cases. The Company includes the following entities: UAL Corporation; UAL Loyalty Services, LLC; Ameniti Travel Clubs, Inc.; Mileage Plus Holdings, Inc.; Mileage Plus Marketing, Inc.; MyPoints.com, Inc.: MyPoints Offline Services, Inc.; Cybergold, Inc.; iTarget.com; UAL Company Services, Inc.; UAL Benefits Management, Inc.; United BizJet Holdings, Inc.; BizJet Charter, Inc.; BizJet Fractional, Inc.; BizJet Services, Inc.; United Airlines, Inc.; Kion Leasing, Inc.; Premier Meeting and Travel Services, Inc.; United Aviation Fuels Corporation; United Cogen, Inc.; Mileage Plus, Inc.; United GHS, Inc.; United Worldwide Corporation; United Vacations, Inc. UAL Corporation is the publicly traded parent company for United Air Lines, Inc.

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INTRODUCTION

Contrary to this Court's longstanding practices, petitioners, the United Retired Pilots Benefit Protection Association, *et al.* ("URPBPA"), seek review of two questions deliberately left unresolved at both levels of appellate review below. *See, e.g., Regents of the Univ. of S. Calif. v. Bakke*, 438 U.S. 265, 283 (1978); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927). The court of original jurisdiction, the bankruptcy court, did indeed address and decide the merits of petitioners' essential claim that United Air Lines, Inc., ("United") and the Air Line Pilots Association, International ("ALPA") could not amend their collective bargaining agreement without involving URPBPA or other representatives of United's retired pilots. The

bankruptcy court correctly decided that question in favor of United and ALPA, and adverse to URPBPA.

But when URPBPA appealed, the district court dismissed on jurisdictional grounds, and did not reach the merits. URPBPA thereupon took a second appeal, this time to the United States Court of Appeals for the Seventh Circuit, which again ruled in United's favor without reaching the merits. At no stage in the appellate process — not in the bankruptcy court, the district court, the court of appeals, or even now in this Court — have the petitioners attempted to obtain a stay of the bankruptcy court's underlying ruling.

As a result of URPBPA's failure to seek a stay, United's complex bankruptcy proceeding continued to march forward towards consummation. All the while, United's bankruptcy plan of reorganization, running to some 143 pages and responsible for allocating billions in value among tens of billions of claims, steadily took shape, provision by provision, procedural step by procedural step. Third-party reliance on the termination of all four of United's pension plans, one of the central premises of the overall restructuring, continued to accumulate. Attended by media fanfare, United eventually emerged from bankruptcy on February 1, 2006. Accordingly, by the time this case was decided by the Seventh Circuit on March 31, 2006, United's reorganization already had been finalized, and reopening the pilot pension restructuring would have meant revisiting United's plan of reorganization as a whole — going back, if not to square one, then at least to a bygone milestone passed only by dint of years of effort and millions in expense.

Not surprisingly, Judge Richard Posner, speaking for a unanimous court, blanched at the prospect of shifting United's reorganization into reverse gear. Judge Posner explained that so much of the reorganization had gone forward that the court of appeals could no longer order a "feasible" remedy — even if it agreed with URPBPA's

challenge to the bankruptcy court's underlying ruling. Pet. App. 12a.

The petition in this case presents two questions: (i) whether employers in Chapter 11 must welcome both active employees *and* retirees into a unified, tri-lateral negotiation before seeking to terminate (or, in bankruptcy parlance, "reject") collective bargaining agreements pursuant to 11 U.S.C. 1113; and (ii) whether this supposed requirement for tri-lateral negotiations under section 1113 somehow has become engrafted onto 11 U.S.C. 363(b), a distinct provision applicable to agreed-upon union contract modifications, not contract rejections. Tellingly, the contested issue over the "feasibility" of a remedy at this late juncture, on which the case below was decided, is entirely omitted from the questions presented and appears in the body of the petition only as a one-paragraph, page-29 after-thought. Granting certiorari would thus require the Court to review either an issue omitted entirely from the questions presented or, alternatively, issues that played no role in the two appellate holdings below. Either option would be inconsistent with the Court's sound and settled practices.

Respondents bring these defects in the petition to the Court's attention, as is their obligation. *See* S. Ct. R. 15.2. (response should describe "what issues properly would be before the Court if certiorari were granted"). But as respondents demonstrate below, the 11 U.S.C. 1113 question to which petitioners devote almost their entire attention — a question discussed only in *obiter dicta* and not resolved by the Seventh Circuit — would not be worthy of review even if presented in a pristine posture. As to that issue, there are no splits in the circuits or conflicts with this Court's decisions. And there certainly is no fundamental unfairness in upholding the bankruptcy court's insistence that URPBPA pursue its challenges through appropriate procedural channels.

For all of these reasons, this Court should deny certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 443 F.3d 565. The opinion of the district court (Pet. App. 14a-21a) is unreported. The orders of the bankruptcy court (Pet. App. 22a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2006. The petition for certiorari was filed on June 29, 2006 and docketed on July 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Overview

The Bankruptcy Code protects both active employees and retirees, albeit through different statutory provisions and procedural mechanisms.

Workers actively employed by an employer in Chapter 11 often have a keen interest in seeing their company emerge from bankruptcy in robust economic health. This is true in particular of workers for unionized employers, like airlines, where seniority on the job counts and changing jobs can mean returning to the back of a seniority queue. On the other hand, workers, including union workers also want to preserve, as best they can, their pre-bankruptcy wage and benefit levels. Employers in Chapter 11 can therefore alter collective bargaining agreements covering unionized workers via only two mechanisms. The agreements may be modified either through mutual consent of employer and union pursuant to section 363(b) of the Bankruptcy Code, or via an employer's unilateral "rejection" of a union contract under section 1113 of the Code. Even when an employer acts unilaterally under

section 1113, however, it must first negotiate with its union, thus establishing a record of reasonableness or unreasonableness that may be put in issue in the context of a motion to reject. Only if a bankruptcy court determines after hearing that a union has rejected proposed contract modifications without good cause, will an employer be permitted to reject unilaterally the union's contract. *See* 11 U.S.C. 1113(c).

Retired workers drawing pensions, by contrast, primarily focus on one thing only — money, and enough of it to fund as much of their pension benefits as possible. That flow of money is protected in bankruptcy, as an initial matter, by the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. 1001 *et seq.* ERISA requires an employer — even while in Chapter 11 — to continue funding its pension plans unless the plans are terminated voluntarily by the employer under ERISA section 4041, 29 U.S.C. 1341, or involuntarily by the Pension Benefit Guaranty Corporation ("PBGC") under ERISA section 4042, 29 U.S.C. 1342. Pension holders and their living beneficiaries are further protected by being allowed to contest any application to terminate a pension plan. *See* 29 U.S.C. 1341(b)(2), (c)(3), 1342(c), (d)(2)(B). Once a pension plan has been terminated, retirees receive claims against their former plan's sponsor for benefits they have lost. Together with those of other claimants, all such claims are then sorted out and paid off (usually in cents on the dollar) as part of the employer's Chapter 11 reorganization plan. Pension holders may accordingly oppose any debtor company's reorganization plan that they consider too stingy in making up for unfunded pension benefits. *See* 11 U.S.C. 1128; Fed. R. Bankr. P. 3020(b). Here, again, any party whose rights are impaired by a reorganization plan may contest the plan, and the plan must be rejected if it would "discriminate unfairly" or fall short of being "fair and equitable." 11 U.S.C. 1129(a)(8).

B. The Potential Section 1113 Hearing

Prior to entering bankruptcy, United struggled with an unsustainable labor-cost structure embodied, in part, in its collective bargaining agreements. Because labor costs constitute one of any airline's largest categories of expense, lowering labor costs, both directly and through more efficient work practices, was an essential precondition for United to recover its financial health. One significant aspect of United's overall labor cost picture were the weighty obligations mandated by four different pension plans. As of December 9, 2002, when United entered bankruptcy, all four of the United-sponsored defined-benefit pension plans were under-funded. The pension plan relevant to this case was called the United Airlines Pilot Defined Benefit Pension Plan (the "Pilot Plan"). To achieve the cost savings necessary to allow United to emerge from bankruptcy as a viable business, United determined that it needed to terminate the Pilot Plan, as well as its three other pension plans. United made this difficult decision only after unsuccessfully seeking financing guaranteed by the Air Transportation Stabilization Board, which had been created to speed the recovery of the airline industry in the aftermath of the September 11 terrorist attacks.

The first step in the pension plan restructuring process required United and the union representing United pilots, the Airline Pilots Association, to divorce United's obligation to maintain the Pilot Plan from its obligation to abide by its collective bargaining agreement. The second step required United to seek termination of the existing Pilot Plan under section 4041 of ERISA. *See also* Pet. 2 & n.1, 11. In November 2004, United took the first step. United began informal negotiations with ALPA to amend the pilots' collective bargaining agreement to eliminate United's contractual obligation to maintain the Pilot Plan, and to reduce pilot wages and benefits. Also in November 2004, as a fallback mechanism, United filed a motion pursuant to 11

U.S.C. 1113 to invoke the formal negotiation and hearing procedures for a "rejection" of the ALPA collective bargaining agreement. The point of this section 1113 motion was to preserve the option of a bankruptcy-court-approved rejection of the ALPA collective bargaining agreement in the event United and ALPA could not agree on how to modify it.

As the section 1113 rejection process got underway, Independent Fiduciary Services, Inc. ("IFS"), a full party to the bankruptcy as the independent fiduciary of United's pension plans, tried to participate in that process. After being denied a seat at the section 1113 negotiating table by the bankruptcy court, IFS appealed to the district court, which, on April 7, 2005, affirmed on the merits. IFS then appealed the district court decision and sought expedited review. The Seventh Circuit affirmed the district court, holding that IFS was not an "interested party" within the meaning of section 1113(d) and, therefore, had no right to participate in a section 1113 rejection hearing or attendant negotiations.

One day after the bankruptcy court denied IFS the ability to participate in the section 1113 rejection hearing, the United Retired Pilots Benefit Protection Association, which represents approximately one-half of United's retired pilots, showed up and made precisely the same request. URPBPA sought to be appointed what it termed a "section 1113 authorized representative" "to defend the retired pilots' interests" in connection with any section 1113 rejection hearing. On December 14, 2004, the bankruptcy court denied URPBPA's motion just as it had IFS's earlier motion. The bankruptcy court held that "there's no such thing" as a "section 1113 authorized representative" for retirees, and that any negotiations prior to a section 1113 hearing to reject the ALPA collective bargaining agreement needed to involve only parties to that agreement; namely, United and ALPA. *See* Pet. App. 24a.

C. The Section 363(b)(1) Approval

Meanwhile, on December 30, 2004, the government, through the PBGC, initiated its own proceeding to involuntarily terminate the Pilot Plan. As the Seventh Circuit recognized below, the "PBGC anticipated that if the pension plans were not terminated, and so continued generating new vested pension rights, the plans would go into default and as the insurer of those rights the PBGC would face a staggering liability." Pet. App. 5a. Notably, a court can order a PBGC-initiated involuntary termination of a pension plan *despite* any collectively bargained contractual obligation of the plan sponsor to maintain the pension plan. *See* 29 U.S.C. 1341(a)(3). Moreover, although a PBGC-initiated involuntary termination is brought *against* the plan sponsor, it can be fully contested by affected unions and pension beneficiaries. *See* 29 U.S.C. 1342; *see also* Pet. App. 4a-5a. As the Seventh Circuit noted, "the retired pilots both participated in and argued against the PBGC's application for involuntary termination of the pension plans under 29 U.S.C. § 1342." Pet. App. 10a-11a.

In the wake of the government's move to terminate the Pilot Plan, United and ALPA informally concluded ongoing negotiations to modify the ALPA collective bargaining agreement. On January 19, 2005, United filed a motion seeking approval of a new, renegotiated ALPA collective bargaining agreement, pursuant to section 363(b) of the Bankruptcy Code, which requires court approval of transactions by a Chapter 11 debtor that are outside the ordinary course of business. *See* 11 U.S.C. 363(b)(1). URPBPA objected to United's motion to approve the renegotiated agreement. *See* Pet. 10. URPBPA contended that United and ALPA could not amend their existing collective bargaining agreement without the consent of United's retired pilots, even though no retired pilot and no organization representing retired pilots were parties to that agreement. URPBPA specifically contended that section

1113's provision for negotiations involving an employer with its workers both (i) encompassed retirees, and (ii) applied to a section 363(b) proceeding to approve an agreed-upon contract modification. On January 31, 2005, the bankruptcy court overruled URPBPA's objection and approved the renegotiated ALPA collective bargaining agreement pursuant to 11 U.S.C. 363(b) (the "363(b) Order"). It is this order, the bankruptcy court's 363(b) Order, that is at issue in the petition.

The new ALPA collective bargaining agreement included concessions critical to putting United back on firm financial footing. The agreement permitted United to reduce base pilot pay rates and other benefits. The agreement also provisionally stated that if United should need to seek termination of the Pilot Plan on its own initiative (as opposed to a termination on the initiative of the PBGC) then, under certain circumstances, ALPA would waive any claim that this would violate the renegotiated ALPA collective bargaining agreement. (Judge Posner dubbed this aspect of the new ALPA collective bargaining agreement the "'no fight' clause." Pet. App. 11a.) Importantly, the new ALPA collective bargaining agreement — in and of itself — did not and could not result in the termination of the Pilot Plan or any accrued pension benefits; instead, such a termination could occur only via a ruling of the bankruptcy court pursuant to ERISA. In exchange for ALPA's concessions, United agreed to provide ALPA's represented pilots certain replacement benefits upon United's emergence from bankruptcy.

United believed, and the bankruptcy court agreed that approval of a restructuring of ALPA's collective bargaining agreement would render unnecessary the Bankruptcy Code's section 1113 process — a process that applies solely to an employer's *unilateral* (albeit court-approved) "rejection" of a collective bargaining agreement. *See* Pet. App. 31a. United accordingly withdrew its prophylactic section 1113

motion, which as noted above, had been filed and allowed to lie dormant as insurance against a potential deadlock in the union negotiations. Given the intervening agreement with ALPA, the motion addressed a now-superseded and irrelevant issue, for it sought the "rejection" of a contract no longer in force. Pet. App. 4a, 16a-17a, 41a. Despite United's withdrawal of its section 1113 motion, URPBPA continued its appeal of the hypothetical question whether United could reject the ALPA collective bargaining agreement pursuant to section 1113, without negotiating with a so-called "section 1113 authorized representative" of retirees. The district court granted United's motion to dismiss the appeal, explaining that United's motion to reject the ALPA agreement had been withdrawn and "the revised [agreement] was obtained without a section 1113 hearing." Order (Feb. 15, 2005). URPBPA did not seek further appeal of that decision.

Meanwhile, the PBGC's proceeding to involuntarily terminate the Pilot Plan continued, and from September 19 to 21, 2005, the bankruptcy court conducted a trial to determine whether the PBGC had established the Pilot Plan should be involuntarily terminated. Both URPBPA and ALPA participated in that trial, putting the PBGC to its proof. On February 13, 2006, the bankruptcy court made proposed findings of fact and conclusions of law recommending the Pilot Plan be involuntarily terminated, and on June 13, 2006, the district court adopted those findings and conclusions with minor modifications. The district court order terminating the Pilot Plan is now pending on appeal in the Seventh Circuit.

D. The Appeals

Without requesting that the bankruptcy court stay its 363(b) Order pending appeal, URPBPA appealed from that order on February 7, 2005, essentially asserting that United had violated section 363(b) by failing to comply with procedures specified under section 1113. Once in the district

court, URPBPA again failed to seek a stay of the section 363(b) Order or the ongoing bankruptcy proceedings below, but the district court promptly dismissed URPBPA's appeal as interlocutory. URPBPA then waited almost a month before timely filing its notice of further appeal to the Seventh Circuit on July 19, 2005. In the Seventh Circuit, URPBPA again failed to seek either the expedition of its appellate case or a stay of the bankruptcy proceeding in general or the section 363(b) Order in particular.

On March 31, 2006, the court of appeals affirmed the judgment of the district court — two months after the bankruptcy court approved United's reorganization plan, ending one of the largest and most complex corporate bankruptcies in history. *See* Pet. App. 1a-13a. In disagreement with the district court, the Seventh Circuit found that URPBPA's appeal was not interlocutory. Although the court acknowledged that the retired pilots' claims were not resolved as favorably as the current pilots' claims, it found this fact unremarkable. As the court noted, the "retired employees were bound to receive less; they lost less." Pet. App. 6a. Specifically, "a retired pilot will have enjoyed the benefit of full pension payments since his retirement, while an active pilot who is near retirement will have been contributing to the pension plan for many years without receiving any benefits." *Id.*

Turning to the nature of the legal dispute at issue, the Seventh Circuit rejected the manner in which URPBPA had framed its own appeal and proceeded to reframe the question as follows:

> [T]he question presented by this appeal is not the procedures required by section 1113, since no order was ever issued under this section. It is what negotiating rights if any the retired pilots should have had with regard to the

> agreement that the bankruptcy judge approved under section 363(b)(1).

Pet. App. 9a.

Addressing itself to that question, the Seventh Circuit stated in *dicta* the following:

> [T]he criteria for approval [under section 363(b)(1)] — whether the transaction makes good business sense and does not disturb the creditors' rights *inter se* — do not argue compellingly for requiring the debtor to negotiate with creditors seeking special consideration just because they may be in a position to throw a monkey wrench into a transaction otherwise highly advantageous to the debtor and the creditors as a whole.

Pet. App. 11a.

The court of appeals thus strongly hinted, but did not decide, that URPBPA's challenge to the bankruptcy court's 363(b) Order lacked merit. The court of appeals never reached the merits, because it ultimately held that no "feasible" remedy could be granted to URPBPA at that late stage of proceedings. The court's rationale was as follows:

> Even if, despite what we have just said, the bankruptcy judge should have conditioned approval of the section 363(b)(1) agreement on the retired pilots' being made negotiating partners with United and the union, there is no longer any feasible remedy that a court could order. To avoid the unraveling of the section 1342 proceeding and perhaps of the entire bankruptcy (though that seems unlikely), we would not order the [ALPA] Agreement vacated. That would be a "logical" remedy but unnecessarily disruptive. All we could do

> would be to direct the bankruptcy judge on remand to determine what he would have insisted that the retired pilots receive in the agreement, as a condition of his approving it, had he realized they had the same kind of interest as the active pilots, namely the interest conferred by a right to mount an opposition to the termination of the pension plans. But there would be no objective basis for calculating the value that such a right would command in a hypothetical negotiation.

Pet. App. 12a.

Having lost its appeal, URPBPA did not seek a stay before the Seventh Circuit, and the Seventh Circuit's mandate issued on April 24, 2006. After waiting a full 90 days to file, URPBPA timely sought a writ of certiorari from this Court — almost a year and a half after entry of the bankruptcy court's 363(b) Order being challenged. At no time during the 90-day petition period did petitioners seek a stay from the circuit justice of any of the decisions in this appeal that had gone against them below.

In the interim, United's plan of reorganization, premised on the termination of all of United's pension plans, was approved by its creditors and confirmed by the bankruptcy court on January 20, 2006. URPBPA participated in that confirmation hearing and objected to the plan, but those objections were overruled (and are now on appeal to the Seventh Circuit). Accordingly, on February 1, 2006, United's reorganization plan was declared effective, triggering a cascade of literally thousands of transactions, including the extension of billions of dollars in financing, the distribution of billions of dollars of cash, notes, and stock to tens of thousands of creditors, and the discharge of billions of dollars of debt. Since United's plan was declared effective, the United securities distributed on February 1

have been traded in the public markets in millions of transactions by members of the investing public. Each of the millions of transactions involving billions upon billions of dollars that has occurred since February 1, 2006, has been premised on the capital structure of the reorganized United, which has in turn been premised on the validity and integrity of United's reorganization plan; which was in turn premised on the restructuring of United's pension liability approved by the courts below.

ARGUMENT

The petition should be denied for the fundamental reason that it seeks review of questions not resolved by the court of appeals or district court below. That must be the beginning and should be the end of any certiorari analysis. But even apart from omitting the question found dispositive by the Seventh Circuit, the petition necessarily poses several additional, extraneous issues that would have to be resolved before this Court could reach petitioners' principal contention regarding the bankruptcy court's supposed violation of 11 U.S.C. 1113. Finally, even in a case (unlike this one) where petitioners' principal question under 11 U.S.C. 1113 had been cleanly and properly presented, that question would not merit the Court's attention. It does not implicate an irreconcilable circuit split or any other consideration warranting certiorari.

I. THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PASSED ON BELOW, AND SHOULD NOT BE REVIEWED ON CERTIORARI.

The Seventh Circuit did not resolve the questions appearing in the petition. The basis for the decision below was instead a doctrine that, although applied in common across all the circuits, goes unmentioned by name in the Seventh Circuit — the doctrine of "equitable mootness."

Equitable mootness is the doctrine courts use for the essential office of forcing bankruptcy appellants to push their appeals through the judicial system as quickly as possible. The equitable mootness doctrine holds that appellate courts will not ordinarily disturb a bankruptcy court ruling, where, as here, the bankruptcy case has already culminated in the emergence of the debtor from the bankruptcy court's protection. *See In re Manges*, 29 F.3d 1034, 1038 n.6 (5th Cir. 1994), *cert. denied sub nom. Manges v. Seattle-First Nat'l Bank*, 513 U.S. 1152 (1995). The doctrine therefore forces bankruptcy-case appellants to urge courts to stay the progress of a bankruptcy pending the resolution of an appeal, or, alternatively, to seek an expedited resolution of their appeals before a reorganization plan is confirmed. The reasons animating the doctrine include a realization that reopening a concluded bankruptcy is far more momentous than redirecting an on-going one. *See In re Zenith Electronics Corp.*, 329 F.3d 338, 345 (3d Cir. 2003). Plans of reorganization for companies in bankruptcy are highly inter-dependent, and, accordingly, pulling any one strand out from an implemented reorganization plan threatens the entire plan's viability. "[I]n common with other courts of appeals," the Seventh Circuit has therefore recognized, "that a plan of reorganization, once implemented, should be disturbed only for compelling reasons." *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). This forbearance and respect for the stability of confirmed plans is essential to preserve "interests bought and paid for in reliance on judicial decisions," and to avoid the "pains that attend any effort to unscramble an egg." *Id.*

Here, the bankruptcy court confirmed United's reorganization plan on February 1, 2006, and the Seventh Circuit's appellate decision issued on March 31, 2006. The Seventh Circuit thus rightly concluded that, at the time it ruled, there was "no longer any feasible remedy that a court could order," Pet. App. 12a, given "the pains that attend any

effort to unscramble an egg." *In re UNR Indus.*, 20 F.3d at 769.

Although the Seventh Circuit decision did not cite the phrase, it clearly relied on the doctrine of "equitable mootness." Uniquely and somewhat confusingly, decisions of the Seventh Circuit expressly object to "equitable mootness" as a descriptive term but not as a substantive legal doctrine. *See In re Envirodyne Indus., Inc.*, 29 F.3d 301 (7th Cir. 1994) (Posner, J.); *In re UNR Indus., Inc.*, 20 F.3d 755 (7th Cir. 1994) (Easterbrook, J.). Arguing that "equitable mootness" is a misnomer because the doctrine it refers to is not equivalent to constitutional mootness doctrines embodied in Article III, Seventh Circuit decisions have expressly "anathematized" the term "equitable mootness" and struck it from the Seventh Circuit's legal lexicon. *See Envirodyne*, 29 F.3d at 304. As *UNR*, *Envirodyne*, and the decision below make clear, however, the Seventh Circuit has anathematized only the words "equitable mootness" and not the doctrine those words signify. That doctrine remains alive and vibrant, as demonstrated by Judge Posner's decision for a unanimous panel below.

While the Seventh Circuit's decision turned on the "feasibility" of granting relief or, put differently, the "equitable mootness" of any complaints about URPBPA's exclusion from United's union contract negotiations, petitioners skip immediately to the merits while ignoring the critical fact that the district court and court of appeals never reached those merits. The petition should thus be denied on grounds that the Court will not grant review where, as here, a petitioner fails to present the dispositive questions "involved in the decision of the Court of Appeals." *Taylor*, 353 U.S. at 557 n.2; *see also Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958). Only "exceptional cases coming here from the federal courts," warrant certiorari on issues not previously addressed by any other appellate court. *Duignan v. United States*, 274 U.S. 195, 200 (1927). But, as

discussed at length below, this case is not one for granting review outside of normal practices.

II. THIS CASE PRESENTS THREE COLLATERAL ISSUES, ALL UNWORTHY OF REVIEW, THAT REQUIRE RESOLUTION IN URPBPA'S FAVOR BEFORE THE COURT MAY REACH THE PRINCIPAL QUESTION PRESENTED.

URPBPA must clear three distinct, preliminary hurdles before it may direct the Court's attention to the section 1113 question on which its petition focuses. None of these preliminary questions are worthy of review in their own right. Both individually, and to an even greater extent collectively, these questions pose a significant risk that a grant of review in this case would later have to be retracted by dismissing the case as improvidently granted. *See Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 126 S. Ct. 2921 (2006) (per curiam); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (per curiam). Before reaching petitioners' section 1113 claims, this Court logically would be bound to determine: (i) whether URPBPA's claims are equitably moot due to URPBPA's failure even to attempt to stay the continuing forward march of United's bankruptcy proceedings; (ii) whether the Seventh Circuit erred in concluding that 11 U.S.C. 1113 questions are *not* properly presented on this record because, if not equitably moot, the case is governed exclusively by the terms of 11 U.S.C. 363(b)(1); and (iii) whether, even assuming the section 1113 issues were both live and relevant, URPBPA may mount a challenge as to those issues in the wake of the Seventh Circuit's prior determination of precisely the same issues in the context of an already concluded appeal from the United bankruptcy case.

A. The Equitable Mootness Issue Must Be Decided In URPBPA's Favor Before The Court May Reach URPBPA's Section 1113 Claims.

The *only* holding of the Seventh Circuit decision below is that no feasible relief could be granted to the petitioners at this juncture. *See* Pet. App. 12. But that holding does not remotely warrant this Court's time and attention. The Seventh Circuit's discomfort with "equitable mootness" nomenclature should not be mistaken for discomfort with the underlying doctrine. Equitable mootness can best be viewed as one species in the broader genus of "prudential mootness." *See, e.g., Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980) (per curiam) (prudential mootness, "[t]he cousin of the mootness doctrine, in its strict Article III sense, is a melange of doctrines relating to the court's discretion in matters of remedy and judicial administration"). The distinguishing feature of equitable mootness as a species of prudential mootness is that in substance and name it has been adapted to the bankruptcy law environment. *See Bank of Marin v. England*, 385 U.S. 99, 103 (1966) ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); *see also Pepper v. Litton*, 308 U.S. 295, 304 (1939).

Whatever the nomenclature, there is no disputing the universal acceptance of the equitable mootness doctrine. All twelve federal courts of appeals of general jurisdiction (the Federal Circuit excepted) have embraced that doctrine. *See In re PWS Holding Corp.*, 228 F.3d 224, 235-236 (3d Cir. 2000); *City of Covington v. Covington Landing Ltd. P'Ship*, 71 F.3d 1221, 1225 (6th Cir. 1995); *In re Manges*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993); *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993); *Rochman v. N.E. Utils. Serv. Group*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992);

First Union Real Estate Equity & Mortgage Inv. v. Club Assocs., 956 F.2d 1065, 1069 (11th Cir. 1992); *Cent. States, S.E. and S.W. Areas Pension Fund v. Cent. Transp. Inc.*, 841 F.2d 92, 95-6 (4th Cir. 1988); *In re AOV Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *In Re Bel Air Assocs.*, 706 F.2d 301, 304-06 (10th Cir. 1983); *In re Info. Dialogues, Inc.*, 662 F.2d 475, 476-77 (8th Cir. 1981) (per curiam); *Trone v. Roberts Farms Inc.*, 652 F.2d 793, 796-97 (9th Cir. 1981); *see also In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1360 (Fed. Cir. 1999) (finding it unnecessary to affirm based on equitable mootness in light of other grounds for affirmance). The equitable mootness decision below thus involves no circuit-split that might justify this Court's review.

Indeed, if ever a case warranted dismissal on equitable mootness principles, it is this one. Bankruptcy proceedings, by their nature, involve fast-paced, "real time litigation." *In re USA Capital, L.L.C.*, 251 B.R. 883, 888 (Bankr. D. Colo. 2000); *accord Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (courts must "deal efficiently and expeditiously with all matters connected with the bankruptcy estate"). Nonetheless, at every stage of this case in the bankruptcy court, on appeal, and even in this Court, URPBPA inexplicably has failed even to attempt to use the tools available to preserve its legal challenge against the rising tide of equities militating in favor of "preserving interests bought and paid for in reliance on judicial decisions." *In re UNR Indus.*, 20 F.3d at 769. Despite the availability of numerous procedural vehicles for seeking to stem this mounting tide, URPBPA never attempted to freeze third-party reliance by staying the bankruptcy proceeding. *See* Fed. R. Bankr. P. 8005 (authorizing stays); Fed. R. Civ. P. 62 (same); Fed. R. App. P. 8 (same); S. Ct. R. 23 (same). When asked at oral argument below about its failure to seek stays, URPBPA's only explanation was that it did not think that seeking a stay was necessary and did not want to slow down the

bankruptcy. *See* Oral Arg. Tr. in *In re UAL Corp.*, No. 05-3121 (7th Cir. Feb. 24, 2006) at 9-10; *see also In re US Airways Group, Inc.*, 369 F.3d 806, 810 (4th Cir. 2004) (applying equitable mootness doctrine and reasoning: "To this day, appellant has offered no explanation for its failure to defer implementation of the termination order or the reorganization plan by seeking a stay. This factor therefore weighs strongly in favor of a finding of equitable mootness.").

Against this backdrop, URPBPA's unconvincing, one-paragraph attempt to refute the Seventh Circuit's "feasibility" holding comes far too late and brings far too little to the argument. *See* Pet. at 29-30. A confirmed plan of reorganization for United is in effect and has been substantially consummated. United has left the bankruptcy court's protection. And URPBPA indisputably has slept on its rights. At this late juncture, URPBPA should not be permitted to place in jeopardy the rights of thousands of third parties who have relied on the continuing stability of United's plan.

B. The Seventh Circuit Correctly Held That The Merits Issue In This Case Arises Under 11 U.S.C. 363(b)(1), Not 11 U.S.C. 1113.

In unraveling the doctrinal spaghetti bowl created below, no task is more urgent than separating out two distinct strands of bankruptcy doctrine: the one represented by 11 U.S.C. 363(b), governing mutually *agreed-upon* modifications to collective bargaining agreements; and the one represented by 11 U.S.C. 1113, governing unilateral *rejections* of collective bargaining agreements. It thus bears heavy emphasis that the only merits decision in this entire appellate chain was the original decision of the bankruptcy court. That decision holds that retiree representatives may not force their way into negotiations leading up to *agreed-upon* collective bargaining agreement modifications

approved under section 363(b). The section 1113 questions URPBPA would place front and center in this Court played no role in the entire chain of bankruptcy court, district court, and court of appeals decisions below.

The specific bankruptcy court ruling on appeal, the 363(b) Order, approved agreed-upon collective bargaining agreement changes that had been negotiated by United and ALPA and approved by a vote within ALPA. The Seventh Circuit thus hits the mark in framing "the question presented by this appeal" as "not the procedures required by section 1113" since "no order was ever issued under that section," but rather the question whether companies that include pension obligations in collective bargaining agreements must somehow engage their retirees as a separate group (it is unclear exactly how) before bargaining to change those agreements. Pet. App. at 9a. Whereas petitioners discourse expansively on steps that must be taken to amend collective bargaining agreements outside of bankruptcy, *see, e.g.*, Pet. at 21-26, they never cite a single case for the proposition they must defend: that section 363(b) imposes independent obligations on unions and management to bargain with retirees in NLRB-unfair-labor-practice-style good faith before seeking to modify collectively bargained for pension provisions.

Petitioners recognize this difficulty and have framed their second question presented in an effort to overcome it. *See* Pet. at i. Specifically, petitioners have sought to paper over the petition's absence of authority under section 363(b) by framing their second question in terms suggesting that vacatur of a 11 U.S.C. 363(b) approval can be somehow deployed as a remedy for a supposed 11 U.S.C. 1113 violation. *See* Pet. at i. But section 1113, and whether or not it would have been violated in hypothetical circumstances, is not the point. Section 1113 was in play in United's bankruptcy only because of United's decision to file and then hold in limbo a section 1113 motion as a

fallback mechanism in the event the ALPA negotiations failed. When the agreed-upon modifications became effective, United's section 1113 filing was withdrawn without being ruled upon. It is thus happenstance that section 1113 was ever invoked below. United might just as well have engaged ALPA in negotiations, reached agreement, and had that agreement approved, without ever mentioning 11 U.S.C. 1113.

In short, petitioners recognize the riddle posed by the fact that the bankruptcy court ruled under 11 U.S.C. 363(b) while they assert error under 11 U.S.C. 1113. But they have no solution, as is indicated by the fact their second question is never separately elaborated and is hardly even defended. Nowhere do petitioners explain how their second question satisfies the Court's criteria for certiorari, such as whether the issue has split the circuits. Petitioners are mounting a submerged challenge to an uncontroversial section 363(b) ruling that is far from worthy of the Court's attention.

C. Law Of The Case Doctrine And An Earlier Seventh Circuit Appeal Bar Consideration Of URPBPA's Section 1113 Claims.

In June 2004, United agreed to the Department of Labor's suggestion to appoint Independent Fiduciary Services ("IFS") as an independent fiduciary of United's pension plans for the purpose of representing in the bankruptcy proceedings the pension interests of current and retired United employees. At a hearing on December 9, 2004, IFS attempted unsuccessfully to participate in any section 1113 hearing that might eventually be held. IFS's concern was the same one that now animates URPBPA; namely, that IFS's fiduciary duty "to protect the interests of present retirees" under United plans would not necessarily be "protected by either the unions or the PBGC." IFS Brief at 10 n.13, *In re UAL Corp. (IFS)*, No. 05-2061 (7th Cir. Apr. 20, 2005). On appeal from the bankruptcy court's ruling

denying the IFS motion, the Seventh Circuit held that only employers and the union (and any guarantor of benefits in a collective bargaining agreement, like the PBGC) were proper parties to 11 U.S.C. 1113 hearings. *See In re UAL*, 408 F.3d 847, 851 (7th Cir. 2005).

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Under the doctrine of law of the case, "when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). Like *res judicata* and collateral estoppel, law of the case is a principle of preclusion that "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues,'" *Christianson*, 486 U.S. at 816 (quoting 1B James W. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at 118 (1984)). Given the identity of the interests they represent, it was thus clear from the outset that the IFS appeal would create section 1113 law of the case that would bind URPBPA and *all* similarly situated parties to the United bankruptcy.

Nonetheless, with clear knowledge of the pending IFS appeals, URPBPA did not try to expedite a decision in its own section 1113 motion and appeal, or to join IFS in its appeal. Indeed, URPBPA declined altogether to appeal to the Seventh Circuit the denial of its section 1113 appointment request. URPBPA must accordingly clear a third and final hurdle before directing the Court's attention to section 1113 — explaining why law-of-the-case doctrine does not preclude the reexamination by this Court of the precise point resolved earlier by the Seventh Circuit, *see* Christianson, 486 U.S. at 816, and why, even if such a re-

examination were proper, the Court's limited resources should be devoted to it.

III. EVEN IF THIS CASE CLEANLY PRESENTED URPBPA'S SECTION 1113 CLAIMS, THOSE CLAIMS REMAIN UNWORTHY OF REVIEW.

Neither the district court nor the court of appeals reached and rejected the petitioners' arguments concerning application of section 1113. But even if squarely and cleanly presented, petitioners' section 1113 contention would remain unworthy of this Court's attention. As to those issues, there is no split among the circuits; no conflict with this Court's own decisions; and no fundamental injustice in upholding the bankruptcy court's rulings.

The circuit splits that petitioners invoke based on *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988), and *In re Century Brass Prods., Inc.*, 795 F.2d 265 (2d Cir. 1986), cannot withstand scrutiny. Both cases involved the potential rejection of collective bargaining agreements *after* a section 1113 hearing, not the consensual modification of agreements pursuant to section 363(b). Neither *Unimet* nor *Century Brass* even considers section 363, or ventures any pronouncement about the principles that might apply where, as here, no 11 U.S.C. 1113 hearing is held.

Furthermore, both *Unimet* and *Century Brass* were handed down before Congress enacted the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610. That Act put in place 11 U.S.C. 1114's tailored procedures for protecting retiree medical benefits against termination in bankruptcy. Crucially, section 1114 codifies the *results* in *Unimet* and *Century Brass*, using newly minted statutory language, while leaving the pre-existing section 1113 statutory *text* intact. How could Congress expect conspicuously different statutory texts, placed side-by-side to carry identical meaning? Not surprisingly, so far as we are aware, no case decided after the

1988 enactment of section 1114 has held that retiree representatives must be appointed under section 1113.

Petitioners also argue unconvincingly that the bankruptcy court's ruling conflicts with this Court's decisions in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). But *Pittsburgh Plate Glass* did not arise in a bankruptcy case and was decided over a decade before Congress enacted 11 U.S.C. 1113. Similarly, there can be no on-all-fours conflict with *Bildisco*, because *Bildisco* was also decided before the enactment of 11 U.S.C. 1113, and it did not involve disputes over retiree pension benefits.

Petitioners are ultimately left with little more than an appeal from hardship, together with an insistent cry for equity. *See* Pet. at 2 (many retired pilots will "suffer drastic life-altering losses in retirement income"). But United would be the last to deny that bankruptcy means hardship. Bankruptcy happens only when there comes a time in a company's history when there is not enough money to go around. Those are days when legitimate economic expectations are dashed on all sides. United's retirees, many former employees, its current employees, creditors, stockholders, and many others all suffered economic hardship from United's bankruptcy. It could hardly have been otherwise.

What United's retirees have not suffered is any form of procedural or substantive inequity. The fundamental lesson the retired pilots were taught by the rulings below is that retired workers must look to the law of bankruptcy and pensions, not to their former union, to protect their interests when their company enters bankruptcy. URPBPA actively represented United's retirees at the trial that terminated their generous former benefits. As a result of the termination of the former pension plan, the retirees gained claims against

United for the loss of all pension benefits left uncompensated under ERISA. *See* Pet. App. 5a. (noting retired pilots "do have unsecured claims arising from their contractual pension rights, to the extent they're not compensated by PBGC insurance"). Of course, these unsecured claims will not recoup anything close to full value, and the claims must vie against other claims for even partial payment under United's overall plan of reorganization. Here again, however, URPBPA represented the retired pilots at the hearing to confirm the terms of United's reorganization, and it made the best case it could on their behalf. URPBPA has had every full opportunity to represent its members' interests under both ERISA and the Bankruptcy Code.

In the end, it is not surprising that Congress and the courts have insisted that retirees should depend on ERISA, the Bankruptcy Code, and themselves alone, not on help from a former union. For better or worse, approximately 92 percent of the workforce in the private sector (the sector subject to the effects of bankruptcies) is non-union. In the larger picture, the bankruptcy court rulings below simply mean that, in this context at least, former union members enjoy no different or greater procedural and substantive rights than workers a union has never represented. Putting former union members and persons who have not belonged to unions on equal footing is not inequitable.

CONCLUSION

For the reasons stated, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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